BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF ULP#14-77 MONTANA FEDERATION OF TEACHERS on behalf of EASTERN MONTANA COLLEGE FACULTY BARGAINING COALITION,	)	
Complainant,	)	FINAL ORDER
-vs-	)	
ROBERT N. MOYES and his agents who comprise the Petitioners seeking Decertification in Case DC#8-77.	)	

* *

A Proposed Findings of Fact, Conclusions of Law and Recommended Order was issued by Hearing Examiner, Mr. Jerry L. Painter, in the above captioned matter on July 29, 1977, dismissing the unfair labor practice complaint.

Exceptions to the Proposed Order were filed by Complainant on August 24, 1977 and oral argument was heard before the Board of Personnel Appeals on October 21, 1977.

After reviewing the record and considering the briefs and oral arguments, the Board makes the following Order:

IT IS ORDERED, that the Exceptions to the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Proposed Order are denied.

IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law and Recommended Order issued by the Hearings Examiner.

Dated this 1st day of November, 1977.

BOARD OF PERSONNEL APPEALS

By Brent Cromley
Brent Cromley
Chairman

BEFORE THE BOARD OF PERSONNEL APPEALS

MONTANA FEDERATION OF TEACHERS on behalf of EASTERN MONTANA COLLEGE FACULTY BARGAINING COALITION, Complainant, -vs- ROBERT N. NOYES and his agents who comprise the Petitioners seeking Decertification in case DC #8, Respondents.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER ULP #14, 1977

* *

The Eastern Montana College Bargaining Coalition filed unfair labor practice charges against the above-named Respondents with the Board of Personnel Appeals on May 24, 1977. The complaint alleged that Respondents represented to employees contacted that by signing decertification cards they would be expressing a vote of confidence in the Coalition, and that such fraudulent representations induced certain employees to sign the cards when they otherwise would not have done so. The charge was signed by Joseph W. Duffy, counsel for the Montana Federation of Teachers, a member of the bargaining coalition.

Hearing on the matter was conducted on June 17, 1977, in the Petro West Room of the Eastern Montana College Student Union Building. Duly appointed Hearing Examiner for the Board was Jerry L. Painter. Mr. Duffy represented Complainant, and Dr. Noyes represented Respondents. Mr. Duffy moved that the petition filed with the Board be amended so that the Complainant be the "Montana Federation of Teachers on behalf of the Eastern Montana College Faculty Bargaining Coalition." The motion was granted and the Hearing Examiner declared that the American Association of University Professors, a member of the Coalition, is not a participant in the complaint.

The following Findings of Fact, Conclusions of Law, and Recommended Order are based upon a thorough review of the entire

record in this matter, including sworn testimony, exhibits as evidence, and written briefs.

FINDINGS OF FACT

1. Robert N. Noyes, a respondent in this matter, circulated a petition (Complainant's Exhibit 1.) among the members of the Eastern Montana College Faculty Bargaining Coalition seeking the signatures of those who "request that the Faculty Senate call for a vote on decertification when presented with the petition. Forty-nine members, including Dr. Noyes, signed the petition, which is dated November 9, 1977. Dr. Noyes was motivated to circulate the petition after observing several complaints among the members against the coalition.

2. The rules of this Board require that a petition for decertification be filed not more than 90 nor less than 60 days before the expiration of the current collective bargaining agreement. Since the Coalition's contract with the College expired June 30, 1977, the rule required the petition for decertification to be filed between May 2 and April 2. A few days before April 2, Dr. Noyes met with some of his colleagues to discuss approaching faculty members about signing authroization cards to decertify the coalition.

3. Those circulating the cards knew the legal effect of enough people signing the cards would be to call for a representation election, rather than to be a vote of confidence in the Coalition. Dr. Noyes testified that those circulating the cards

> wanted to have a positive attitude. We wanted to ask people to sign these. I said, "Please, don't use any pressure." Other people said, "Yes, why don't you suggest that this will call for a new election." I think we all agreed that if we didn't get the number of cards, we were going to junk the whole thing and join one of the two outfits and try to make the coalition work. I said, or someone said, "Tell these people that with a new election, if 'no' wins, well, that's 'no.' If AAUP, MEA (Montana Education Association), AFT (American Federation of Teachers) should win, we should all join them and support them." We tried to have a very wholesome, positive approach. We wanted

to get out of this bickering and, the business, the two outfits that weren't working together, representing us. That was the gist of it.

4. George Madden, Associate Professor of Education, member of the Coalition Council, and chief spokesperson for the bargaining team that negotiated the contract that expired June 30, was approached by Dr. Noyes to see whether he wanted to sign the petition sent to the Faculty Senate in November. There is a conflict in testimony as to what exactly transpired during their conversation. Dr. Noyes testified that he did not tell Dr. Madden that the purpose of the petition was to get a vote of confidence in the coalition. He said he told Dr. Madden that it could be considered as a vote of confidence in the sense that if there were not enough signatures obtained to make the petition effective, he would throw it away. He testified that he did not tell Dr. Madden that signing the petition would be a vote of confidence in the Coalition.

Dr. Madden said in a sworn affidavit (Complainant's Exhibit 2) that Dr. Noyes told him that the purpose of the November petition "was to secure a vote of confidence in the Coalition." He testified to the same effect at the hearing. Dr. Madden, who did not sign the petition, testified that he told Dr. Noyes at the time that he didn't see the petition to have that effect, but he said he believed the disagreement resulted from his having had more opportunity than Dr. Noyes to study and know about the law of collective bargaining in Montana. Dr. Madden did not deny Dr. Noyes's statement that Dr. Noyes did not say that signing the petition would be a vote of confidence in the Coalition.

5. Dr. Noyes and Dr. Madden had a conversation in April concerning the circulation of the authorization cards, and neither mentioned the question of the petition or the cards being a "vote of confidence."

6. Dr. Madden witnessed a faculty member approach one of

his colleagues about signing an authorization card. He testified that the would-be signer was told it was an "opportunity to have a vote of confidence" in the Coalition, and he said in a sworn affidavit (Complainant's Exhibit 2) that the person soliciting the signature said "the purpose was a vote of confidence" in the Coalition.

7. Dr. Madden knows of no faculty member signing an authorization card believing it to be a vote of confidence in the Coalition. He testified that he was "pretty confident" that a number of faculty members signed cards believing them to be "involved with some kind of vote of confidence and did sign cards for that reason," but admitted that his belief comes from second-hand information. He said at the hearing, "I have heard people tell me that they have known people who said they signed it [the card] thinking it was a vote of confidence."

8. B.L. Mausman, Associate Professor of Psychology, was approached by a colleague and asked if he wanted to sign the November petition as it was being circulated. He was told the petition would be a chance to clear the air and have a vote of confidence in the Coalition.

9. James Ziegler, Associate Professor of History and President of the College's chapter of AFT, said in a sworn affidavit (Complainant's Exhibit 4) that a faculty member told him that the "drive for signatures for a decertification election" had been represented to him as a vote of confidence. Dr. Ziegler testified that he told the person that he saw the cards as a vote for decertification of the Coalition rather than as a vote of confidence, unless one considers that by winning the election, the Coalition would habe the confidence of the faculty. Dr. Ziegler told him that not signing the card would be a vote of confidence in the Coalition.

10. William Plank, Associate Professor of French and

grievance officer for the College's chapter of AFT, was visiting one day in April with Joann Meide, reference librarian, and a faculty member who was circulating authorization cards. He told the man that he thought circulating the cards would damage the credibility of the Coalition at the bargaining table. Dr. Plank said in a sworn affidavit (Complainant's Exhibit 3) that the person "answered me that he did not consider it damaging to the bargaining talks and that he was doing it because it was a vote of confidence for the bargaining agent." Dr. Plank testified that when he asked how that could be, the man told him that if the Coalition produces well and proves itself at the bargaining table, it will win the election and be stronger than ever.

11. Dr. Plank and Ms. Meide were approached later by another faculty member circulating authorization cards. Dr. Plank asked him why he was signing a card, since he thought that would jeopardize the Coalition's credibility at the bargaining table. The faculty member told him four or five times in the ensuing conversation that there was no danger in that, that the card was merely a vote of confidence. The person did not tell Dr. Plank that he had been told the card was a vote of confidence.

12. Ms. Meide was asked by a colleague who had received an authorization card if signing it actually would be a vote of confidence. She told the person it would not. Ms. Meide had no knowledge of anyone signing an authorization card believing it to be a vote of confidence. She was told by some persons who signed the November petition they intended their signatures to be construed as a vote of confidence. She did not know as of the hearing how many there were.

Discussion: It must now be determined whether the use of the term "vote of confidence" in the situations revealed at the hearing was misleading and constitutes a misrepresentation so as to probe Complainant's charge of an unfair labor practice. If

Complainant's charge is upheld, the Hearing Examiner must also determine the appropriate recommended remedy.

The charge is against Dr. Noyes "and his agents," those who comprise the petitioners seeking decertification in case DC #8. Dr. Noyes contended in his reply brief and at the hearing that he should not be considered a labor organization and accordingly cannot be guilty of an unfair labor practice. Counsel for Complainant referred to the definition of "labor organization" in Section 59-1602(5), R.C.M. 1947:

> any organization or association of any kind in which employees participate and which exists for the primary purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, fringe benefits, or other conditions of employment.

It appears that Dr. Noyes and those seeking decertification of the Coalition would fall into this definition, in view of their combined activities to determine the sentiment among the faculty members for decertification of the existing bargaining representative. Counsel further pointed out that Section 59-1607(1), R.C.M. 1947, in setting up the procedure for hearing an unfair labor practice complaint, says, "Whenever a complaint is filed alleging that any <u>person</u> has engaged in or is engaging in any such unfair labor practice . . ., (emphasis added) and "person", according to Section 59-1602(8), "includes one or more individuals." Respondents therefore seem to clearly be subject to the rights and responsibilities of the Montana statutory provisions for collective bargaining as a labor organization.

Counsel for Complainant alleges in his brief that the representations of Respondents in circulating both the November petition and the April authorization cards should be considered by the Hearing Examiner, even though the November petition lacked formality necessary to call for a representation election. The total of all testimony and evidence will be considered by the Hearing Examiner as requested by Counsel, but the representations

concerning the earlier petition. That is because the issue here is what the signers of the cards could reasonably have been led to believe, not what may have been the belief of the signers of the petition, a document expressing mere intention and having no power to initiate proceedings with this Board that would give the parties the rights and responsibilities under Montana's collective bargaining laws.

Dr. Madden testified at the hearing and Counsel for Complainant emphasized in his brief that although the signers of the cards were college professors with advanced academic degrees, it should not be assumed that they had any expertise to interpret the language on the cards or that they had even a working knowledge of thier rights under the collective bargaining laws. The hearing Examiner will consider these remarks in making his recommended order and will consider all other factors necessary to ensure the protection of the rights of all parties involved conferred by the collective bargaining laws.

Counsel for Complainant cites in his brief several cases decided by the National Labor Relations Board (NLRB) and United States circuit courts of appeals that considered the effect of inaccurate and misleading representations to would-be signers of authorization cards. Made by labor organizations the leading case has been NLRB v. Cumberland Shoe Corp., 351 F.2d 917, 60 LRRM 2385 (6th Cir. 1965, enforcing Cumberland Shoe Corp., 54 LRRM 1233 (1963) which turned on the ruling that if authorization cards are solicited with the representation that they will be used for an election and they are later used to prove majority status, there is no misrepresentation. Misrepresentation occurs under the Cumberland rule only when the signers are told the cards will be used only for an election.

The rule has been subject to much discussion in the courts. In NLRB v Koehler, 55 LRRM 2578 (7th Cir. 1964), the court would

enforce the NLRB's order to the employer to bargain with the union. The order, made on the basis of a majority of the employees signing authorization cards, was held invalid because all the employees had been told the cards were, in the words of one witness, "not to get a Union in there, it was just so there would be a vote to see if a Union would get in there".

The court said in NLRB v Winn-Dixie Stores, Inc., 58 LRRM 2475, 2478 (6th Cir. 1965):

> The decisions of the Board as well as the opinions of the courts place more emphasis upon the representations made to the employees at the time the cards were signed than upon the language set forth in the cards. If in fact misrepresentations are made by the union to employees to the effect that the only purpose of the card is to authorize the union to petition the Board for an election, the card will not be construed to authorize representation, even though it contains language to that effect.

The court found that the NLRB's decision that there were no misrepresentations of sufficient weight to invalidate the authorization cards' selection of the union as the employees' proper bargaining agent was based on substantial evidence.

A misrepresentation may not be as serious when there is no ambiguity in the language in the card, as indicated in NLRB v. Peterson Bros., Inc., 58 LRRM 2570 (5th Cir. 1965). The wife of one employee who could not read signed and sent in an authorization card for her husband. The card read:

> I, the undersigned employee, . . . hereby selected the above named union as my collective bargaining agent. This is not an application for membership. This card is for use in support of a demand of this union for recognition from the company in your behalf, or for an N.L.R.B. election. (Emphasis added.)

Upon finding that his wife had sent in the card, he had her read him the letter that accompanied it. He became angry because he did not favor the union, but was only neutral toward it. He testified that he did not try to get the card back because the company president told him the cards did not make any difference since there would be an election anyway. The court said at 58

LRRM 2572, "This reliance upon the president's statement might not have any substantial effect were it not for the ambiguous language on the face of the card." It was accordingly held his card could not count toward the selection of the union as bargaining representative.

9. Crawford Mfg. Co. v. NLRB, 66 LRRM 2529 (4th Cir. 1967), concerned misrepresentations about cards that clearly designated the union as the desired collective bargaining representative for the signers and that said nothing about an election. The court said the trial examiner found with "ample justification" that some employees were led to believe that signing the cards would only call for an election and that others were confused by the union's representations as to the cards' significance. The examiner also found that some employees were led to believe that by signing the cards they would not be joining the union until the union had won the election and had succeeded in negotiating a contract satisfactory to the employees. The court said at 66 LRRM 2532:

> Proof of such a prevalent and pervading misconception when generated by the union organizer's representations cannot be ignored. It is not decisive that the cards in their terms contained no suggestion that they signified anything less than a direct grant of authority for the union to act as collective agent for the employees. Despite the regard we hold for the contrary opinion, e.g., NLRB v. Cumberland Shoe Corp., 351 F.2d 917, 920, 60 LRRM 2385 (6 Cir. 1965) and cases there cited, we will not stick mechanically to the literal phrasing of the cards. A ghost of the parol evidence rule, such literalism subordinates what really counts: the actual understanding of the signers.

It was held in Engineers & Fabricators, Inc. v. NLRB, 64 LRRM 2849 (5th Cir. 1967), that when cards are challenged because of alleged misrepresentations by the union in their solicitation, the NLRB cross-petitioning for enforcement of its order has the burden of proving the subjective intent to authorize representation by the union was not vitiated by the misrepresentations. This would be so even though the employees had not been told that the

only purpose of the cards was to institute an election.

The United States Supreme Court, as Counsel mentions in his brief, was faced with a question of the validity of the Cumberland rule in NLRB v. Gissell Packing Co., ___U.S.___, 71 LRRM 2481 (1969). The court said at 71 LRRM 2493:

> In resolving the conflict among the circuits in favor of approving the Board's Cumberland rule, we think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature.

It appears then that the trend of the cases cited above culminated in the Supreme Court's statement that card signers will be bound by the clear language of the card unless they have been given misrepresentations that clearly preclude their signatures. Applying this rule to the case at hand makes it incumbent upon the Hearing Examiner to recommend dismissal of the complaint.

The cards for decertification of the Coalition say:

> I, the undersigned, a member of the Eastern Montana College Faculty Bargaining Coalition (AFT-AAUP) no longer believe this Coalition represents the interests of the majority of the employees in the unit.
>
> _____ Name _____ Date

It was not established by the evidence that any signers of the cards signed believing they were casting a vote of confidence in the coalition. Dr. Noyes probably did mention "vote of confidence" to Dr. Madden in his conversation with him concerning the November petition, but it was not established that he said signing it would constitute a vote of confidence. (See Finding of Fact No. 4) Dr. Madden, furthermore, did not sign the petition. The term "vote of confidence" was also used in conversations with Dr. Mausman (Finding of Fact No. 8), Dr. Ziegler (Finding of Fact No. 9), Dr. Plank (finding of Fact No. 10), and Ms. Meide (Finding of Fact No. 10, 11, and 12). The conversation Dr. Plank and Ms. Meide had with a card signer is the only evidence that someone signed

the card believing it to be a vote of confidence. (See Finding of Fact No. 11.) But that person did not say he was told that signing it would be such a vote, and the Hearing Examiner is unable to draw the inference that any other members of the faculty were expressly told that signing the card would be such a vote after considering the hearsay evidence of Dr. Madden (Finding of Fact No. 7) and the testimony of Ms. Meide that some signed the November petition believing it to be a vote of confidence (Finding of Fact No. 12).

The Hearing Examiner sees nothing prejudicial to the rights of those signing the cards by the mere use of the term "vote of confidence," as it appears quite fair to use that term in the context of looking ahead to a representation election where all those supporting the Coalition would have the opportunity to so express themselves. (See Findings of Fact No. 3, 4, 7, 8, and 10.) This is analogous to the situation described by the U.S. Supreme Court in Gissel, supra:

> There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election. Elections have been, after all, and will continue to be, held in the vast majority of cases. (71 LRRM at 2493)

The cases cited by counsel also show that before the courts will overturn the results of a showing of interest by authorization cards, there must be evidence of a sufficient number of signers having been given misrepresentations so as to find that a majority (or other applicable percentage) of the signers did not support the petitioned-for issue. (See Trend Mills, Inc. 154 NLRB No. 7, 59 LRRM 1714, Peterson, supra, and Koehler, supra.) Only one of the 68 cards supporting decertification was shown to be questionable. (See Finding of Fact No. 11.) The Hearing Examiner made it clear to counsel that he would allow any card signer to testify if Counsel could show the relevance of such testimony.

Since there is insufficient evidence to support the unfair labor practice charge, it is unnecessary to determine the appropriate remedy.

CONCLUSIONS OF LAW

1. Robert N. Noyes and others who circulated decertification cards fall under the definition of "labor organization" of the Montana collective bargaining statutes and are accordingly conferred the legal rights and responsibilities conferred on labor organizations under those statutes.

2. Robert N. Noyes and his agents did not commit an unfair labor practice in their conduct attending the circulation of the decertification cards.

RECOMMENDED ORDER

The unfair labor practice complaint brought against Robert N. Noyes and his agents is hereby dismissed.

DATED this 29th day of July, 1977.

BOARD OF PERSONNEL APPEALS

BY Jerry L. Painter
Jerry L. Painter
Hearing Examiner